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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/929,569	08/14/2001	David Cooke	F3271(C)	9161

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UNILEVER  
PATENT DEPARTMENT  
45 RIVER ROAD  
EDGEWATER, NJ 07020

EXAMINER

HENDRICKS, KEITH D

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 08/14/2002

7

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/929,569

Applicant(s)

COOKE ET AL.

Examiner

Keith Hendricks

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--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-14 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3 and 7-14 is/are rejected.
- 7) ☒ Claim(s) 2 and 4-6 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some \* c) ☐ None of:
1. ☒ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 3.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

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## DETAILED ACTION

### *Claim Rejections - 35 USC § 112*

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 8 and 11 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 8 is indefinite, as it is unclear as to how "beadlets" may comprise "a preculture of the microorganism." While microbes are commercially available in freeze-dried form, and as frozen "beadlets", this would not be considered a "preculture of the microorganism", but rather simply the microorganism. It is suggested that the phrase "a preculture of" be deleted from the claim.

The phrase "wherein the fermented mixture is diluted with non-fermented mixture", in claim 11, is indefinite. It is unclear at what point in the process the non-fermented mixture is added; either during fermentation, which comprises fermented mixture, or only after fermentation has been stopped. In other words, it is unclear if this is a continuous process, or a batch process.

Further, it is unclear from the claim if the "non-fermented mixture" which is added, corresponds to the same original mixture used in claim 1, part (i), or simply some other composition which has not been fermented.

\* NOTE: While not indefinite, *per se*, it is suggested that the phrases "homopolysaccharide producing" and "dextran and/or fructan producing", in claims 1 and 3, be amended to "homopolysaccharide-producing", to more clearly link the two terms. See, for example, where this has been done in claims 5 and 14.

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*Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1,3,7 and 10-14 are rejected under 35 U.S.C. 102(b) as being anticipated by Schol et al. (US PAT 5,308,628).

Schol et al. disclose a method of preparing frozen dairy desserts, by fermenting a lactic-acid bacterial culture in a milk composition (see instant specification, pg. 6, for acceptable milk compositions), until the mixture reaches a pH in the range of between 4.3 and 5.5. The pH is not regulated during the fermentation. One of the utilized lactic acid bacteria is the anaerobic microorganism, *Lactobacillus acidophilus*, which is a known dextran-producing microorganism (see the table at col. 2 of US PAT 6,399,119, as evidence of this production). The fermentation was carried out for a period of 15 hours, at which time "to the fermented product 21 kg saccharose and 7kg dextrose were added" (see example 1). The fermented mixture was then pasteurized and used as a base for a frozen dessert, including the production of ice cream (see abstract and examples). In view of the above variables being met by the reference, it would be considered an inherent result of the disclosed method, that the homopolysaccharide concentration would be at least 0.3% of the composition (instant claim 7).

*Claim Rejections - 35 USC § 103*

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 8 and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Schol et al.

The use of microorganisms from commercial sources includes the availability of these microbes in various forms, including freeze-dried and frozen "beadlets." The form in which the microorganisms are available, commercially or otherwise, is unrelated to the utilization of the microorganisms within the

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instantly-claimed and disclosed, absent any clear and convincing evidence and/or arguments to the contrary, demonstrating a distinct difference or advantage. This would be tantamount to a claim to "a method of using a toy comprising building a structure with blocks", and a dependent claim reciting "wherein the blocks arrive in a box." Thus, the use of the microorganisms in the form in which they are commercially and/or publicly available, would have been obvious to one of ordinary skill in the art. Furthermore, the culturing of the microorganisms within a given temperature range in which the microbes grow and provide fermentation, was well known in the art. Lactic acid bacteria were well-known to thrive in a culture temperature range of, generally, 20-35° C. See, for example, column 2 of US PAT 4,444,793, of record, or common lactic fermentation textbooks known in the art. Thus, the selection of a temperature range for fermentation as taught by Schol et al. would not have involved an inventive step, and it would have been obvious to one of ordinary skill in the art to have fermented the microbes in a temperature well within the instantly-claimed range.


### Conclusion

Schwartz et al. (US PAT 4,444,793) is considered on-point as the closest prior art of record. However, this reference utilizes whey, instead of milk, as the fermentation media. Applicants' specification, at page 6, specifically excludes whey and whey products as encompassed by the term "milk", as it appears in the claim. The reference provides no motivation to utilize another culture media, including milk, which, although well-known in the art, would not have been obvious from the teachings therein. Several other references of record provide for the fermentation of *Leuconostoc* microbes in milk-containing cultures. However, they differ in the procedures disclosed; namely the maintenance of pH and adjustment with acids (US PAT 6,004,800 and 4,877,634). No pH is provided for Pucci et al. (US PAT 5,223,431), and thus it would not have been obvious to maintain the pH in the instantly-claimed range, without regulation or adjustment, and would not have been obvious to have stopped the fermentation before the pH dropped below 5.5.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (703) 308-2959. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703) 308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9565 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.

  
KEITH HENDRICKS  
PRIMARY EXAMINER